Supreme Court, U.S.
FILED

01 658 OCT 22 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

HAROLD MCGUIRE,

Petitioner,

versus

LOWE'S HOME CENTERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

PHILIP C. KIMBALL
Counsel of Record
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

50 pp

QUESTIONS PRESENTED FOR REVIEW

What constitutes an acceptable appellate opinion?

When may evidence otherwise apparently probative of age bias properly be said to constitute mere "stray remarks" or "ambiguous statements" and therefore not probative of such bias?

Is some sort of sophisticated statistical "expert" necessary to interpret statistics that show a great disparity between the percentage of an employer's management work force over the age of 40 years and the percentage of individuals over the age of 40 years in the national workforce?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Harold McGuire, petitioner herein and appellant/plaintiff below; and Lowe's Home Centers, Inc., a North Carolina corporation, respondent herein and appellee/defendant below.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Authorities v

Opinions and Orders Below 1

Jurisdiction of the Court 2

Constitutional, Statutory, and Rules Provisions Involved in this Case 2

Statement of the Case 4

Argument (Reasons for Granting Review) 13

I. The District Court's Summary Judgment in this Case was Erroneous and the Court of Appeals did not adequately vindicate the Petitioner's Right to Appeal 13

II. This Court should articulate Standards for an acceptable Appellate Opinion 16

III. This case presents Significant Questions Concerning What constitutes "Stray Remarks" and "Ambiguous Statements" in Employment Discrimination Cases, and what Evidentiary Value such Remarks and Statements, and Certain Statistical Evidence, have in such Cases 17

Conclusion 18

Appendix

Opinion of the United States Court of Appeals for the Sixth Circuit, No. 00-5169, filed May 25, 2001, affirming 1a

TABLE OF CONTENTS – Continued

Page

Opinion of the United States District Court for Eastern Kentucky at Ashland, No. 97-119, entered and filed on July 15, 1999, supporting Order granting summary judgment 4a

Order of the United States District Court for Eastern Kentucky at Ashland, No. 97-119, entered July 15, 1999 ..... 26a

Order of the United States District Court for Eastern Kentucky at Ashland, No. 97-119, denying FRCP 59(e) relief, entered and filed January 24, 2000 ..... 28a

Order of the United States Court of Appeals denying the Petition for Rehearing, No. 00-5169, entered July 23, 2001 ..... 29a

TABLE OF AUTHORITIES

Page

CASES

Birgel v. Board of Commissioners of Butler County, 125 F.3d 948 (6th Cir., 1998) 14

Cordova v. State Farm Ins. Co., 123 F.3d 1145 (9th Cir., 1997) 10

Danzer v. Norden Systems, Inc., 151 F.3d 50 (2d Cir., 1999) 12

Dothard v. Rawlinson, 433 U.S. 321 (1977) 12

Ercegovich v. Goodyear Tire and Rubber Co., 154 F.3d 344 (6th Cir., 1998) 11

Ben Fitzgerald Realty Co. v. Mueller, 846 S.W.2d 110, *writ denied* (Tex. App. 1993), *rehearing of writ of error overruled* (1993) 14

Godwin v. Hunt-Wesson, Inc., 150 F.3d 1217 (9th Cir., 1998) 10

Harness v. Hartz Mountain Corporation, 877 F.2d 1307 (6th Cir., 1989) 9

Huff v. UARCO, Inc., 122 F.3d 367 (7th Cir., 1998) 11

Lujuan v. Houston General Insurance Company, 756 S.W.2d 295 (Tex. 1988) 14

McDonnell-Douglass Corp. v. Greene, 411 U.S. 792 (1973) 13

Moodie v. Jenks, 329 Mass. 332, 108 N.E.2d 558 (1952) 14

Schlote v. Walker, 87 Neb. 406, 127 N.W. 123 (1910) 15

Siegel v. Levy Organizational Development Co., 153 Ill.2d 534, 607 N.E. 2d 194 (1992) 14

TABLE OF AUTHORITIES – Continued

Page

Smith v. Ohio Northern University, 33 Ohio App.3d 238, 514 N.E. 2d 142 (1986) 14

Standard Oil Co. v. State of New Jersey by Parsons, 341 U.S. 423 (1951) 15

State Bar of Texas v. Evans, 774 S.W.2d 656 (Tex. 1989) 14

United States ex rel. Thomspon v. Twomey, 493 F.2d 1325 (7th Cir., 1974) 15

Widoe v. District #111, Otoe County Schools, 147 F.3d 726 (8th Cir., 1998) 11

White v. Honeywell, Inc., 141 F.3d 1270 (8th Cir., 1998) 10

CONSTITUTIONAL PROVISION

Constitution of the United States, Amendment V 2

STATUTES

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 9

Kentucky Revised Statutes §344.010(1)(a) 3

Kentucky Revised Statutes §344.020(1)(a) 9

Kentucky Revised Statutes §344.040(1) 3, 8

Kentucky Revised Statutes §344.450 ..... 4, 8

RULES OF PROCEDURE

Federal Rule of Civil Procedure 1 2

Federal Rule of Civil Procedure 59(e) 9, 13

TABLE OF AUTHORITIES – Continued

Page

Federal Rule of Appellate Procedure 38 3

Rules of the Supreme Court of the United States 10(a) 4, 16, 17

Rules of the Supreme Court of the United States 10(c) ..4, 16

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit entered an Order denying the Petitioner McGuire's Petition for Rehearing on July 23, 2000 (Case No. 00-5169). The Order may be found at page 29a of this Petition.

The United States Court of Appeals for the Sixth Circuit filed its Opinion in this case on May 25, 2001 (Case No. 00-5169). The opinion may be found at pages 1a-3a of this Petition.

The United States District Court for Eastern Kentucky at Ashland entered an Order denying the Petitioner McGuire's FRCP 59(e) motion to alter, amend, or vacate its earlier summary judgment against him on January 24, 2000 (Case No. 97-119). The Order may be found at page 28a of this Petition.

The United States District Court for Eastern Kentucky at Ashland entered a summary judgment for the Respondent, Lowe's Home Centers, Inc., on July 15, 1999 (Case No. 97-119). This judgment may be found at page 26a of this Petition. On the same day the Court filed a Memorandum Opinion in support of the summary judgment, which may be found at pages 4a-25a of this Petition.

None of the opinions of the Courts below were published in any official reporter.

JURISDICTION OF THE COURT

The Order (Opinion) sought to be reviewed was entered on May 25, 2001. Reconsideration was denied on July 23, 2001.

The jurisdiction of this Court is invoked under 28 United States Code Section 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED IN THIS CASE

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Civil Procedure 1

These rules govern the procedure in the United States district courts, in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty; with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Federal Rule of Appellate Procedure 38

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Kentucky Revised Statutes § 344.010(1)(a)

(1) The general purposes of this chapter are:

> (a) To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended . . . the Federal Age Discrimination in Employment Act of 1967 . . . and the Civil Rights Act of 1991 as amended. . . .

Kentucky Revised Statutes § 344.040(1)

It is an unlawful practice for an employer:

> (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking.

Kentucky Revised Statutes § 344.450

Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

Rule of the Supreme Court of the United States 10

[Among the character of the reasons the Court considers in determining whether to grant review on a writ of certiorari are the following, that]:

> (a) a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) a . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . .

STATEMENT OF THE CASE

The Petitioner in this case, Plaintiff/Appellant below, is Harold McGuire. McGuire was born in 1945, has an associate's degree in agriculture, and began his working life as a horse trainer at various stables in New York, Ohio, and Colorado. He served in the United States Army from 1969 until 1972, when he was honorably discharged

as a second lieutenant. McGuire received a BS degree from the University of Louisville in 1982. He managed a family owned building center from then until January, 1992, when he removed with his wife from Louisville to Ashland, Kentucky. There he began working for the Respondent, Defendant/Appellee below, Lowe's Home Centers, Inc., at its Ashland store, in an entry level position.

McGuire rose to the position of zone manager at the Ashland store by January, 1994. He was demoted to a sales associate position on February 11, 1997, with an enormous pay cut, and resigned to take a position with another company on April 10, 2000.

In this litigation, McGuire is complaining about three discrete adverse acts that he suffered while employed at Lowe's. One is the denial of a normal merit raise in mid-1994. Another is the denial of a promotion to the position of operations manager during the Spring of 1996. The third is his demotion from his management position to the job of sales associate in February, 1997.

By far the most serious of these changes in McGuire's status was the demotion. It is also the act concerning which McGuire has the best evidence to support his claim of unlawful age bias. For these reasons, McGuire's February 11, 1997, demotion, is the focal point of this petition; the other incidents will be discussed only as they relate to the demotion.

On February 11, 1997, McGuire's boss, Andy Heath, demoted McGuire from his position as Assistant Manager of the Ashland store to an hourly position in sales at the South Point, Ohio, store. At that time Heath told McGuire

that he had been accused of sexual harassment; that he had "brushed against" people, "made gestures" toward them, and "stared" at employees and customers (APX, p. 171). Heath told McGuire no dates, times, names or other specifics then or later but required him to write a "response" to the "charges" against him nonetheless (APX, pp. 146-149, 171-176).

Only after he filed the lawsuit that is the subject of this petition did McGuire have any opportunity to learn the details of the sexual harassment charges against him. The attorney for Lowe's "walked" McGuire through the charges at McGuire's deposition. The details of the charges against McGuire appear in the opinion of the District Court.

McGuire, at his deposition, admitted some of the charged behavior, denied most of it, and denied that any acts that he did commit constituted offensive or sexually harassing behavior. His testimony may be found at pages 147-159 and 172-189 of the Appendix of the record of this case in the Court of Appeals.

Lowe's own handbook required a minimal form of due process for employees accused of sexual harassment, none of which McGuire received (APX, pp. 93, 170, 191-192).

McGuire believed that his demotion was a result of age bias. His evidence in support of this belief, in part, is as follows:

1. McGuire's boss at the time of the demotion was Andy Heath. While the Defendant has insisted throughout this litigation that Heath had nothing to do with the decision to demote

McGuire, he conducted the "investigation" of the sexual harassment charges against McGuire, by his own admission (APX, pp. 51-52), and signed and delivered to McGuire the notice of McGuire's demotion (APX, p. 93).

2. When it had become common knowledge that the position of Operations Manager was open at the Ashland store, not long before McGuire was demoted, McGuire solicited a conversation with Heath about the possibility that McGuire apply for the position. Heath responded that, " . . . he thought yes, that I [McGuire] could do the job," of Operations Manager (APX, p. 205). During the remainder of the conversation, McGuire asked Heath, who was in his mid 30's, what he thought of McGuire personally. Heath responded that McGuire, " . . . remind[ed] me of a fat middle-aged" man, or of a "fat older man," (APX, pp. 210-211; this Petition, p. 22a).

3. Heath never gave McGuire an opportunity to apply for the Operations Manager job, awarding it to one Jim Sowards, a man much younger than McGuire, who was 52 at the time (early Spring, 1997) (APX, pp. 137-138).

4. At an office party for Christmas, 1996, several months before McGuire was demoted, Heath gave McGuire a "Senior Citizen Port-a-Potty" gag gift, after having drawn McGuire's name as the one individual to whom he had to give a gift (APX, pp. 208, 214).

5. Until McGuire was demoted he supervised several employees. Heath regularly referred to the two of these individuals over 40 years of age as "inflexible," and "resistant to change;" and criticized what he called their

" . . . old way of doing things," at work (APX, pp. 192-206).

6. As we have seen, Heath refused to hear McGuire's side of the sexual harassment allegations against him or to afford him any of the "due process" required by company policy (APX, pp. 167-180).

7. The percentage of Defendant's management employees in the tri-state region where McGuire and Heath worked who were over 40 years of age during the years that McGuire worked at the Ashland store was 22.4. Meanwhile, the percentage of individuals in the national workforce over the age of 40 years during the same period was 43.4, almost twice that of Lowe's managers (APX, pp. 94-106).

Other evidence in support of McGuire's claim of age discrimination is described in the Opinion of the District Court. There is no need to catalogue it here because the above described evidence should have conclusively precluded summary judgment against Petitioner McGuire.

* * *

Petitioner McGuire filed his lawsuit in the Boyd Circuit Court of the Commonwealth of Kentucky, alleging that the Respondent Lowe's Home Centers, Inc., had discriminated against him in the terms, privileges, conditions, and compensation of his employment because of his age over 40 years, in violation of various provisions of the Kentucky Civil Rights Act. Kentucky Revised Statutes (KRS) chapter 344, specifically KRS § 344.040(1), as actionable at § 344.450 (APX, pp. 12-14). Federal Title VII and related jurisprudence apply to claims such as

McGuire's brought under the Kentucky Civil Rights Act, KRS § 344.020(1)(a), *Harness v. Hartz Mountain Corporation*, 877 F.2d 1307 (6th Cir., 1989).

The Respondent removed McGuire's lawsuit from the Boyd Circuit Court to the United States District Court for Eastern Kentucky at Ashland based upon diversity of citizenship, pursuant to 28 United States Code § 1332.

On July 15, 1999, after extensive discovery and full briefing by both parties, the District Court granted Respondent's motion for summary judgment (APX, p. 33). Its Memorandum Opinion in support of its judgment (APX, pp. 15-32) and the judgment are appended hereto at pages 4a to 27a.

On July 27, 1999, the Petitioner moved to set aside the judgment of July 15, 1999 pursuant to FRCP 59(e).

On January 24, 2000, the District Court denied the Petitioner's FRCP 59(e) motion without opinion (APX, p. 34; this Brief, p. 28a).

McGuire then appealed to the United States Court of Appeals for the Sixth Circuit. On May 25, 2001, that Court affirmed the dismissal of McGuire's lawsuit in a two paragraph document that is appended hereto at pages la to 3a.

McGuire then moved for reconsideration. On July 23, 2001, the appellate Court denied that motion (this Brief, at p. 29a).

* * *

Petitioner pointed out to the Courts below the well-settled case law that any one of the facts described in

numbered paragraphs 2, 4, and 5, above, sufficed to get his claim of age discrimination to a jury. We should briefly review this case law.

In *Cordova v. State Farm Ins. Co.*, 123 F.3d 1145, 1149, (9th Cir., 1997), the Court held that a boss's calling the plaintiff a "dumb Mexican" was all the plaintiff needed to get his ethnic discrimination case to a jury. In *White v. Honeywell, Inc.*, 141 F.3d 1270, 1274 (8th Cir., 1998) the Court opined that a dead supervisor's having called the plaintiff a "dumb nigger" two years before the plaintiff's discharge from employment was sufficient evidence to create an inference of racial bias in the discharge.

In this case, McGuire's boss, Andy Heath, made the "fat older man" remark to and about Heath during a discussion between the two about McGuire's promotability. In the *Cordova* and *White* cases, the offensive remarks were isolated in time and context from any actual employment decision. The evidence in this case is even more probative of illegal bias, therefore, than the evidence in the cited opinions.

Of course, the "fat older man" remark is just a part of the incriminating evidence in this case. There was also the matter of Heath's "Senior Citizen Port-a-Potty" Christmas gift to McGuire.

Petitioner believes that this was just as probative of illegal bias as the boss's gift to a sex discrimination plaintiff of a "Barbie Doll Kit," with two dildoes and a bottle of Wesson Oil in the case of *Godwin v. Hunt-Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir., 1998).

Then there is the matter of Heath's characterization of McGuire's subordinates' "older way of doing things," "inflexibility" and general, "resistance to change." In *Widoe v. District #111, Otoe County Schools*, 147 F.3d 726, 731-732 (8th Cir., 1998), the Court held that just such remarks were probative of age bias.

Incredibly, the District Court in this case held that Heath's "fat older man" remark, his "Senior Port-a-Potty" gift, and his statements about McGuire's older subordinates were "stray" or "isolated" remarks (Opinion of the District Court; this Brief, pp. 18a-19a).

Of course, this is incorrect. In *Ercegovich v. Goodyear Tire and Rubber Co.*, 154 F.3d 344, 355-356 (6th Cir., 1998), the same Court from which the opinion now under attack emanated held that separate remarks by non-decision makers made two and 14 months, respectively, prior to the plaintiff's discharge could not be considered as "stray remarks." Instead, held the Court, they were probative of age bias in the case.

The District Court additionally opined that Heath's remarks about McGuire's older subordinates as inflexible, resistant to change, and enamored of an "older way of doing things," were too "ambiguous" to indicate age bias (Opinion of the District Court; this Brief, p. 19a). As with the Court's misguided "stray remarks" analysis, the "ambiguous" argument has no legal footing. The uncontested rule is that, "The task of disambiguating ambiguous utterances is for trial, not for summary judgment," *Huff v. UARCO, Inc.*, 122 F.3d 367, 384-385 (7th Cir., 1998). Indeed, upon a motion for summary judgment, allegedly ambiguous statements must be interpreted favorably to a

discrimination plaintiff, *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 54 (2d Cir., 1999).

As if the evidence of Andy Heath's age bias in this case were not enough, the Petitioner also presented, as we have seen, significant statistical evidence that the Respondent harbored age bias. The District Court held that this evidence was worthless, apparently because it was not supported by any sort of "expert" testimony (Opinion of the District Court; this Brief, p. 13a; McGuire's wife figured the relevant percentages, she was a high school math teacher at the time).

Petitioner argued that his evidence that only 22.4% of Lowe's managers in a very large region being over the age of 40 years at the various given times for which he had obtained the evidence from Respondent, while 43.4% of the American work force is over the age of 40 years, all as acknowledged by the District Court itself (Opinion of the District Court, p. 12 a) was about as probative of age bias as statistical evidence is ever likely to be.

In support of this proposition, the Petitioner McGuire cited the case of *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In that case, the female plaintiffs were rejected candidates for work in the Alabama prison system. They could point only to national statistics to suggest that Alabama height and weight requirements would exclude 41.13% of them from jobs in state prisons. This Court upheld the use of these very rudimentary statistics because they indicated a "gross disparity" between the number of females in Alabama and those who could qualify as tall and heavy enough for prison jobs. In the case at bar, of course, the Petitioner has shown just such a "gross disparity"

between national workforce statistics on the age of employed individuals and statistics concerning the age of Lowe's managers. No sophisticated expert analysis is necessary under these circumstances.

ARGUMENT

(Reasons for Granting Review)

I

THE DISTRICT COURT'S SUMMARY JUDGMENT IN THIS CASE WAS ERRONEOUS AND THE COURT OF APPEALS DID NOT ADEQUATELY VINDICATE THE PETITIONER'S RIGHT TO APPEAL.

The District Court overlooked or misapprehended all of the law applying to this case and its summary judgment was wrong. The Petitioner did everything in his power to remedy this injustice: an FRCP 59(e) motion to reconsider, a direct appeal to the United States Court of Appeals for the Sixth Circuit, and petitions to that Court for both panel and en banc rehearing. During the appellate process, Petitioner painstakingly analyzed the facts of his case under both the traditional *McDonnell-Douglass Corp. v. Greene,* 411 U.S. 792 (1973), three-prong approach as well as a "direct evidence" approach that obviously fits this case quite well. In his petition for rehearing to the Court of Appeals he argued that the Court had not vindicated his right of appeal. That was, of course, his first and only opportunity to make that argument until now.

It is not so much the result reached by the Court of Appeals that forms the basis for this petition; it is more the manner in which the Court reached that result.

The Petitioner does not believe that he has had his appeal.

The Court of Appeals did not address any of the issues or arguments that the Petitioner brought before it. It provided no discussion of the arguments before it and gave no independent reasons for what it did, despite the fact that in cases such as this one it was supposed to provide de novo review, *Birgel v. Board of Commissioners of Butler County*, 125 F.3d 948 (6th Cir., 1998), *cert. denied*, 522 U.S. 1109, 118 S.Ct. 138, 140 L.Ed.2d 104 (1998).

Written appellate opinions should address and discuss the points raised by appellants, according to all of the state appellate Courts that have examined standards for such opinions, *Lujuan v. Houston General Insurance Company*, 756 S.W.2d 295 (Tex. 1988), *State Bar of Texas v. Evans*, 774 S.W.2d 656 (Tex. 1989), *Smith v. Ohio Northern University*, 33 Ohio App.3d 238, 514 N.E.2d 142 (1986).

The mere statement that an appellate Court has found no error in a lower court's opinion is insufficient discussion and completely fails to vindicate an appellant's rights, *Siegel v. Levy Organizational Development Co.*, 153 Ill.2d 534, 607 N.E.2d 194 (1992). Indeed, one state Court of Appeals has held that an appellate Court should explain why a plaintiff's evidence is insufficient to support his claim, if such be the case, *Ben Fitzgerald Realty Co. v. Mueller*, 846 S.W.2d 110, *writ denied* (Tex. App. 1993), *rehearing of writ of error overruled* (1993).

Of course state courts do condone an appellate court's summary affirmation when the matter is of trivial importance and the merits are clearly against the appellant, *Moodie v. Jenks*, 329 Mass. 332, 108 N.E.2d 558 (1952);

or where the court finds no prejudicial error in the record, again where the case is of trifling importance, *Schlote v. Walker*, 87 Neb. 406, 127 N.W. 123 (1910).

Obviously, none of these circumstances is present in the case at bar.

There are no opinions from this Court, or even from any of the federal Courts of Appeal, on the issue at bar.

However, we do know that there is no provision in the Federal Rules of Appellate Procedure for any sort of summary disposition of appeals, *United States ex rel. Thompson v. Twomey*, 493 F.2d 1325 (7th Cir., 1974), except, of course, in the case of frivolous appeals, Federal Rule of Appellate Procedure 38.

If anything, the Federal Rules of Civil Procedure, of which the Federal Rules of Appellate Procedure are an adjunct, appear to prohibit the summary disposition of non-frivolous appeals at Federal Rule of Civil Procedure 1. This rule states, in pertinent part, that the civil rules, " . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." There is no justice in the summary affirmation of a judgment in a non-frivolous appeal.

It is also possible, of course, that the summary disposition of a non-frivolous appeal implicates an appellant's due process rights under the Fifth Amendment to the Constitution of the United States, as a lawsuit (chose in action) is a species of property right entitled to Constitutional protection, *Standard Oil Co. v. State of New Jersey by Parsons*, 341 U.S. 428, 71 S.Ct. 822, 95 L.Ed. 1078 (1951).

II

THIS COURT SHOULD ARTICULATE STANDARDS FOR AN ACCEPTABLE APPELLATE OPINION.

The right to appeal, if it is to be more than a formality, must involve some standards for written opinions.

At present, in the federal judicial system, there are no such standards. Neither the Federal Rules of Appellate Procedure, any statute, nor any opinion of any federal Court has ever sought to set forth guidelines for an acceptable appellate opinion.

There can be no justification for this state of affairs if it is likely to result in the sort of injustice that the Petitioner has suffered in this case.

This Court has both the authority and the responsibility to insure that the federal Courts of Appeal fulfill their "error-correcting" duties. Petitioner believes that a few well-chosen words from this Court would go far toward insuring that the Courts of Appeal vindicate the rights of appellants, that they meaningfully discuss and analyze the issues presented to them, and that they adequately inform appellants that their claims have no merit, if that be the case.

A clear indication of the importance of this issue is the straightforward manner in which it implicates both Rules 10(a) and 10(c) of this Court. It is important for justice under federal law [Rule 10(c)] that the Courts of Appeal receive some guidance for their handling of non-frivolous appeals because all litigants are entitled to have their rights respected. In turn, this Court's articulation of some basic standards for appellate opinions should go far

toward reducing the large number of petitions for certiorari based upon the argument that the Courts of Appeal have produced opinions that entitle the petitioners to relief under Rule 10(a) of this Court. An opinion from this Court defining the usual and accepted course of judicial proceedings for the Courts of Appeal could well inspire them to pay increased attention to their primary task, thereby dissuading litigants from turning to this Court.

The late Chief Justice of the United States, Honorable Warren Burger, lobbied for years for the creation of a National Court of Appeals to insure that the error-correcting function of the existing Courts of Appeal was adequately fulfilled. While one opinion from this Court may not have the impact of Justice Burger's proposed Court, it could at least partially remedy the problem of wrongly decided and poorly considered appeals.

Petitioner believes that his case would be an excellent one for this Court to use to address this important issue.

III

THIS CASE PRESENTS SIGNIFICANT QUESTIONS CONCERNING WHAT CONSTITUTES "STRAY REMARKS" AND "AMBIGUOUS STATEMENTS" IN EMPLOYMENT DISCRIMINATION CASES, AND WHAT EVIDENTIARY VALUE SUCH REMARKS AND STATEMENTS, AS WELL AS CERTAIN STATISTICAL EVIDENCE, HAVE IN SUCH CASES.

While these captioned issues might not justify the granting of this petition by themselves, they are nevertheless of interest to a large portion of the bench and bar.

They are also of significance to those individuals and entities involved in discrimination litigation.

Petitioner has already outlined his argument that the Courts below wrongly applied the law to these issues in his case. He is making this a ground for his Petition so that he may not be said to have waived it should the Court grant the Petition.

CONCLUSION

For the reasons stated in this Petition, Harold McGuire requests that this Court grant the Petition.

Respectfully submitted,

PHILIP C. KIMBALL
Attorney for Petitioner
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 00-5169

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAROLD MCGUIRE,	) **ON APPEAL FROM THE**
Plaintiff-Appellant,	) **UNITED STATES**
	) **DISTRICT COURT FOR**
v.	) **THE EASTERN**
	) **DISTRICT OF**
LOWE'S HOME CENTERS, INC.	) **KENTUCKY**
	)
Defendant-Appellee.	) **OPINION**
	) **(Filed May 25, 2001)**
	) NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
	) Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
	) This notice is to be *prominently* displayed if this decision is reproduced.

BEFORE: NORRIS and COLE, Circuit Judges; and STEEH, District Judge.*

PER CURIAM. Plaintiff-Appellant Harold McGuire ("McGuire") initiated a lawsuit against his former employer, Defendant-Appellee Lowe's Home Centers, Inc. ("Lowe's"), setting forth an age discrimination claim under the Kentucky Civil Rights Act ("KCRA"). Specifically, he alleged that Lowe's awarded him a lower raise than that to which he was entitled; failed to promote him to a position for which he was qualified (and promoted instead a younger employee); and demoted and transferred him to another Lowe's store. The district court concluded that McGuire had failed to set forth a prima facie case as to any of his claims, and, in the alternative, that even assuming he could establish a prima facie case, he had failed to rebut Lowe's legitimate, nondiscriminatory reasons for its employment actions. Upon so finding, the district court granted Lowe's motion for summary judgment and dismissed McGuire's complaint. McGuire now appeals from that dismissal and the district court's January 19, 2000, order, denying his motion to alter, amend, or vacate the district court's earlier judgment, pursuant to Fed. R. Civ. P. 59(e).

Having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment in favor of Lowe's or in denying McGuire's motion to alter, amend, or vacate the district

---

* The Honorable George Caram Steeh, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

court's judgment. Because the district court carefully analyzed the law, the issuance of a detailed written opinion by this Court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is **AFFIRMED** upon the reasoning of that court in its written opinion filed July 15, 1999.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 97-119

HAROLD MCGUIRE, PLAINTIFF,

V. MEMORANDUM OPINION & ORDER

LOWE'S HOME CENTER, INC., DEFENDANT.

* * * * * * * * * * *

(Filed Jul. 15, 1999)

This action is before the Court on Defendant's motion for summary judgment. The parties have fully briefed the motion and the Court has thoroughly considered the same. For reasons that follow, the motion shall be granted.

I. Facts:

The essential facts of this age discrimination case are undisputed. The Defendant, Lowe's Home Centers, Inc. ("Lowe's"), hired the Plaintiff, Harold McGuire ("McGuire") at its Ashland, Kentucky hardware store in 1992. McGuire was 47 years old at that time. Though he initially worked in the hourly position of Customer Service Associate, Lowe's quickly promoted McGuire to the salaried Nursery Department Manager position. In July 1993, Lowe's again promoted McGuire to Zone Assistant Manager. During the next three years, Lowe's moved McGuire through Zones 1, 2 and 3 and eventually assigned him to Zone 6, a position reserved for the strongest Zone Assistant Manager.

Plaintiff's overall performance always met the company's expectations. This is reflected in his performance appraisals and further indicated by his rapid succession of promotions. By summer 1994, however, employee interaction problems began to surface. Specifically, three female employees complained to management between July 25 and 27 that they no longer wanted to work with McGuire because he treated them with hostility and disrespect.[1] McGuire met with the store manager, Jeff Rowe ("Rowe") and the Personnel Training Coordinator ("PTC"), Barney Blankenship, regarding these complaints. Blankenship and Rowe issued a "friendly" verbal warning to cease the abrasive conduct.

Merit raise time rolled around about the same time as the complaints against McGuire were lodged. Persons in McGuire's position and salary range with positive performance evaluations could ordinarily expect a 3.5-5.5% pay raise. Though McGuire received only positive reviews in his March 1994 evaluation, Rowe approved only a 3% pay raise.[2] Rowe claims he approved the unusually low

---

[1] In signed statements, Melissa Swanson claimed McGuire spoke to her in a hateful manner on several occasions, used foul language in addressing her, and ignored her pleas for help in serving a customer. Linda Sutphin complained that McGuire refused to help her make change for a customer, that he generally "picked on" her, refused to sign her refund slips, and admonished her in a stern voice in front of a customer. Finally, Mary Miranda claimed McGuire was generally critical of her, had knocked over a stack of papers on her desk, shoved her aside and had even taken the phone out of her hand.

[2] This was the equivalent of $777.00.

award because of the employee complaints. The raise took effect July 30.

Lowe's had no further problems with McGuire's service until 1996. In September of that year, Kitty Sparks, a salaried employee, complained to the new store manager, Andy Heath ("Heath"), that McGuire had demeaned her in front of an hourly employee and generally failed to treat his employees with respect. Heath investigated the complaint by speaking to several other male employees who confirmed the altercation's occurrence but denied being demeaned by McGuire themselves.

Sparks was on vacation during Health's investigation and she complained upon her return that the same was biased as Heath had not interviewed her or any other female employee working under McGuire. After discussing the matter with the District Manager, Jan Lambert, Health conduced a second round of interviews with several other employees. One employee, Sharon Bryant, denied being demeaned by McGuire but claimed he made remarks to her which one might consider sexual harassment. Heath concluded this matter by discussing it with McGuire in the presence of Jim Sowards. Heath admonished McGuire "to handle employees with respect and communicate more." He then cautioned McGuire about his remarks to Sharon Bryant and advised him that sexual harassment would not be tolerated.

On February 8, 1997, Michelle Sluss complained to Heath that McGuire made sexually harassing remarks to her. She claimed McGuire had told her "now we're alone, but it looks like someone got to you before I did". She took offense at this because she was pregnant at the time.

She also stated that McGuire had looked her up and down several days prior and then said "You look good, I can see where you've lost weight in some places and others you haven't." Heath reported this complaint to District Manager Lambert and then proceeded to investigate the same.

As part of his investigation into the Sluss matter, Heath asked a few female employees generally whether they had ever been sexually harassed. Sadie Kirk answered that McGuire had grunted at her when she walked by, remarked on how she [sic] good she looked, eyed her up and down and brushed up against her when he walked by. Cheryl Garrison also complained that McGuire frequently brushed up against her, stared at her when she bent over, eyed her up and down and told her dirty jokes. Finally, Margie Nelson recounted some comments McGuire allegedly made a few days prior. Specifically, she said McGuire had entered the break room wearing gloves with red paint on them. When asked what was on the gloves, someone said it came from a diaper to which McGuire replied "No, I wait until they're a little older than that." On one other occasion, Nelson said she offered McGuire some M&M candies she was eating. McGuire said he did not want an M&M but would "like an M and N" while staring at Nelson whose initials were "M. N."

Heath went back and obtained formal written complaints from Sluss, Garrison, Kirk, and another employee, Andrea Bailey. Kirk and Garrison basically reiterated their prior complaints. Sluss added another complaint that McGuire once approached her while she was holding a pencil and said "here's the hole" while making a circle

with his hand. Andrea Bailey complained of several uncomfortable encounters with McGuire. She indicated that one month prior he offered to scratch her leg for her. On another day, she claimed he told her she looked "mighty fine". On still another day he told her to let him know if she wanted one last fling before she got married. That same day, he approached her and allegedly said "it's so hard you could hang a hammock from it." Finally, Bailey said McGuire had followed, stared, and grunted at her, other female employees and even customers.

Heath submitted the women's signed statements to Lambert and the Human Resource Director, Jake Pearce. Pearce and Lambert decided to transfer and demote McGuire. Lambert filled out an Employee Counseling Report indicating that McGuire had conducted "himself in a less than professional manner [by] making sexual remarks and gestures to females." The report further warned that any further incidences would result in McGuire's termination. Lambert and Heath presented the report to McGuire on February 11, 1997, when they advised him of his demotion. Lambert and Heath both averred that the demotion was strictly the product of the sexual harassment allegations.

As this action currently stands, McGuire accuses Lowe's of age discrimination in demoting him in 1997, refusing to offer him a promotion to operations manager in 1996, and in awarding him only a 3% pay raise in 1994. With regard to the 1997 demotion, McGuire denies the sexual harassment allegations and says the comments and actions attributed to him were either taken out of context or never occurred. He argues that Lowe's failure to seek his side of the story is only further evidence of

Lowe's discriminatory animus. He also complains that he was treated more harshly than other, younger employees accused of sexual harassment. Specifically, he points to three other sexual harassment situations. The first occurred in 1994 when a female employee accused Tim Kochendoerfer of pulling her bra strap and then pulling her between his legs. Rowe investigated this matter then placed a letter of reprimand in Kochendoerfer's file. The second noted incident occurred in 1996 when an employee complained that her department manger [sic], John Barber, denied her requests for a restroom break. Heath merely gave Barber an oral warning. The final incident occurred in 1994 when an employee complained that Bob Nolan, Rick Wilburn and a third, unidentified person, made offensive remarks in her presence. Persons uninvolved in McGuire's case investigated that complaint and found them to have "no real substance". The persons involved received only an "informal talking to" to the best of McGuire's knowledge.

With regard to his 1994 pay raise and the 1996 operations manager promotion, McGuire claims Lowe's generally acted with age based bias in making employment decisions. In support of this general bias claim, McGuire testified as to his belief that Rowe disliked dealing with the older employees. While Rowe seemed quick to sidestep McGuire in dealing with younger subordinates, McGuire says he was often left to deal with the older ones. McGuire says Heath was no better as he occasionally subjected McGuire and other older workers to age-based comments and jokes. At the 1996 Christmas party, for example, Heath gave McGuire a gag gift consisting of a half-gallon jug labeled "Senior Citizen Port-

a-Potty". Roughly a month later, Heath told McGuire he thought he was a good candidate for a district operations job. When McGuire then asked Heath what he thought of him personally, Heath responded that McGuire "reminded him of a fat, middle-aged man".[3] Heath promoted Jim Sowards to the operations manager position a few months after making this comment without giving anyone else notice of this opening or an opportunity to apply. About the same time period, McGuire claims Heath criticized Kitty Sparks and Scott Leonard, both of whom were over 40 years of age, for their "old ways of doing things", inflexibility and resistance to change. McGuire says he felt both Sparks and Leonard were exemplary employees but Rowe refused to consider them for promotion. Indeed, McGuire claims Rowe and Heath both helped many other young, unqualified or underqualified individuals get promotions, transfers and the like but never did so for himself or the other older employees.

II. Summary Judgment Standard:

Under Rule 56 of the Federal Rules of Civil Procedure the Court must view the evidence in the light most favorable to the nonmoving party, in this case the Plaintiff. Thus, when examining the record the Court will resolve doubts and construe inferences in favor of the Plaintiff in an effort to determine if any genuine issues of material fact exist. However, in a series of decisions commonly

---

[3] In other discovery responses, Plaintiff claims Heath might have said "old man" instaed [sic] of "middle-aged man".

referred to as the "trilogy", *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the U.S. Supreme Court emphasized that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. In short, the "trilogy" requires the nonmoving party to produce specific factual evidence that a genuine issue of material fact exists.

The United States Court of Appeals for the Sixth Circuit has interpreted the "trilogy" to mean that the nonmoving party must produce enough evidence, after having had a reasonable opportunity to conduct discovery, so as to withstand a directed verdict motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). As that Court stated, "the movant could challenge the opposing party to 'put up or shut up' on a critical issue . . . [and] if the respondent did not 'put up', summary judgment [is] proper." *Id.* at 1478.

III. Abandoned Claims:

In addition to the claims surrounding the 1994 pay raise, 1996 promotion and 1997 demotion, Plaintiff's complaint accused Lowe's of age discrimination in (1) offering a younger employee a Zone Assistant Manager position rather than Plaintiff in the spring of 1993; (2) transferring and promoting a younger employee rather than Plaintiff to operations manager in 1994; (3) laterally transferring four younger employees to the new South

Point, Ohio store without offering Plaintiff the same opportunity; (4) denying Plaintiff the same vacation benefits and weekends off that younger employees enjoyed; (5) hiring Plaintiff at a lower hourly rate than younger hourly employees; (6) forcing Plaintiff to scrutinize the work of older subordinates more closely than that of younger employees; and (7) subjecting Plaintiff to age based comments and jokes. Plaintiff now concedes that these other claims should be dismissed as separate theories of recovery though he still offers them as evidence of a general, age-based discriminatory animus. In light of Plaintiff's concession, Defendant is entitled to summary judgment on these other claims.

IV. Statistical Evidence

At the outset, the Court notes that Plaintiff offered certain statistical evidence to support his claims. This evidence consists of figures Plaintiff and his wife generated by comparing personnel name, title and age information for employees in Defendant's seventeen area stores between 1992 and 1998 with national work force statistics for persons over 40 as of 1993. Neither Plaintiff nor his wife claim to be expert statisticians. Nevertheless, Plaintiff opines, based on his calculations, that the median percentage of Lowe's managers over age 40 between 1992 and 1998 was 22.4%. Plaintiff further claims this is only ½ the percentage of the American work force age 40 and over as of 1993. From this, Plaintiff insists Lowe's has a company wide bias against older workers.

Defendant, of course, objects to the introduction and consideration of Plaintiff's statistical evidence. Defendant's own expert insists the data provided by Plaintiff is unreliable. The Court finds Defendant's objection well taken. Plaintiff offered no explanation as to his methodology or reliability. The Court is left to assume the comparisons are valid and probative which it cannot do.

The Court realizes, of course, the general importance of statistics in proving employment discrimination. *Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994). They are "unquestionably relevant" as they can provide an inference of discrimination in a disparate treatment case or demonstrate pretext in an employer's articulated, non-discriminatory explanations for its actions. *Id.* at 456. The Court should not consider statistics with little or no probative value, though. *Id.* Where, as here, the statistics are offered "without expert testimony as to methodology or relevance to plaintiff's claim", the evidence should be excluded. *Id; Williams v. Cerberonics, Inc.*, 871 F.2d 452 at 455 n.1 (4th Cir. 1989).

V. Age Discrimination

Plaintiff's complaint accuses the Defendant of age based discrimination in violation of his state civil rights. Specifically, KRS 344.040 makes it unlawful for any employer to "discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's. . . . age forty (40) and over. . . . " This statute, like the rest of the Kentucky Civil Rights Code, is modeled after federal law. *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226,

229 (Ky. 1984). Consequently, the Court must look to both state and federal case law for guidance in determining the merits of Plaintiff's Kentucky age discrimination claim. *Id; Kentucky Center for the Arts v. Handley,* 827 S.W.2d 697, 699 (Ky. App. 1991).

Plaintiff's discrimination claims are subject to the three prong burden shifting test established by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973). *Handley,* 827 S.W. 2d at 699; *Phelps v. Yale Security, Inc.,* 986 F.2d 1020, 1023 (6th Cir. 1993). Thus, Plaintiff must first state a prima facie case of age discrimination by demonstrating, at a minimum, that he (1) belongs to a protected class and (2) received less favorable treatment than younger, similarly situated employees. *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582-83 (6th Cir. 1992). Once the prima facie case is established, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason for its action." *Handley,* 827 S.W.2d at 699. The employer need not convince the court that it was actually motivated by that stated reason. *Cooley v. Carmike Cinemas, Inc.,* 25 F.3d 1325, 1329 (6th Cir. 1994). Should the employer respond adequately, the burden then shifts back to the employee to demonstrate that the employer's proffered reason is pretext. *Handley,* 827 S.W.2d at 699. The employee must do this by showing the proffered reason lacks a basis in fact, did not really motivate the employment action, or was insufficient to motivate the action. *Cooley,* 25 F.3d at 1329-30. It is important to note that only the burden of production shifts between the parties during the process. *Phelps,* 986 F.2d at 1024. The burden of persuasion always remains with Plaintiff. *Id.*

1.) 1997 Demotion

Plaintiff complains that the Defendant demoted him in 1997 because it dislikes older workers. To state a prima facie case of discriminatory employment discipline, Plaintiff must show that he was treated differently than "a comparable non-protected person" who engaged in the same or similar conduct. *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582-83 (6th Cir. 1992). In this case, Plaintiff offers as comparative treatment the 1994 bra strap pulling allegation against Tim Kochendoerfer, John Barber's 1996 refusal of a female employee's request for a bathroom break, and a 1994 complaint that Bob Nolan, Rick Wilburn and a third, unidentified person, made offensive remarks to a female. Each person is younger than Plaintiff. Each received only a verbal or written reprimand for their alleged harassment. None were demoted.

That the other employees were accused of "sexual harassment" does not necessarily make their cases comparable to Plaintiff's. Indeed, the Court can only consider these other charges if Plaintiff shows that they are comparably serious though not necessarily of "precise equivalence in culpability". *Harrison v. Metropolitan Government of Nashville and Davidson County,* 80 F.3d 1107, 1115 (6th Cir. 1996) *quoting McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 283 n.11 (976) [sic]. John Barber's alleged refusal of a female employee's request for a restroom break on one occasion in 1996 is nowhere near as serious as the allegations of repeated misconduct lodged against Plaintiff in 1997. Thus, it is not a suitable basis for comparison.

Presumably, the 1994 bra strap pulling allegation against Kochendoerfer and the offensive comment allegation against Nolan and Wilburn were sufficiently serious. The inquiry does not end there, however. Plaintiff must also demonstrate that these "comparable" non-minority employees were similarly situated in all respects. *Id; Mitchell v. Toledo Hospital,* 964 F.2d 577, 583 (6th Cir. 1992). This means they all must have dealt with the same supervisor, been subjected to the same standards, and engaged in the same or similar misconduct without the existence of such differentiating or mitigating circumstances as would distinguish their actions or Lowe's response thereto. *Mitchell,* 964 F.2d at 583. Plaintiff cannot meet his burden in this case. To begin with, the allegations against Plaintiff were investigated and resolved by different decision makers than those involved in the Kochendoerfer and Nolan/Wilburn matters.[4] Furthermore, the charges against Plaintiff involved complaints of repeated harassment from many different female employees while the Barber, Kochendoerfer and Nolan/Wilburn matters each involved only an isolated instance and one female employee. Finally, the charges against Plaintiff in 1997 which caused his demotion were the second set of charges lodged against him in six months time. Indeed,

---

[4] The Kochendoerfer matter was investigated and resolved by Jeff Rowe and Bob Sells who, in 1994, were the store manager and District Manager, respectively. The Nolan/Wilburn allegations were addressed by Bob Sells and store manager Dick Noble. Andy Heath, the store manager in 1997, Jan Lambert, the District Manager in 1997 and Jake Pearce, the Human Resources Representative, conducted the investigation into the allegations against Plaintiff and made the decision to demote him.

Heath specifically warned Plaintiff at the conclusion of the 1996 investigation that sexual harassment would not be tolerated. There is no evidence that Kochendoerfer, Nolan or Wilburn had ever been charged with or warned against such misconduct before the 1994 allegations. Kochendoerfer and Wilburn have behaved themselves since. Nolan was fired when additional allegations arose some time later.

It appears every employee including Plaintiff received warnings for their first offense. Subsequent misconduct incurred stiffer penalties. There is no evidence that Plaintiff received harsher treatment with regard to the 1997 demotion. If anything, he received more favorable treatment as he was simply demoted rather than terminated for the second allegations of harassment lodged against him. Plaintiff's prima facie case therefore fails.

Even if Plaintiff could state a prima facie case, his demotion claim would still fail. Defendant claims the demotion was the product of the sexual harassment allegations. Those decision makers involved in the investigation and demotion produced affidavits confirming Lowe's position. Lowe's has every right to discipline persons it believes guilty of sexual harassment. *Elrod v. Sears,* Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). Having articulated a legitimate, nondiscriminatory reason for demoting Plaintiff, the burden falls on Plaintiff to prove this proffered reason is pretext.

As proof of pretext, Plaintiff first argues that he is innocent of the sexual harassment charges. Plaintiff's innocence and the validity of the underlying charges are

completely irrelevant to this case. *Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir. 1993); *Elrod*, 939 F.2d at 1470. Indeed, the Court can presume for purposes of this summary judgment motion that the complainants lied "through their teeth". *Elrod*, 939 F.2d at 1470. This proves nothing as to Lowe's actions, though. *Waggoner*, 987 F.2d at 1165.

The real issue here is whether Lowe's reasonably believed the accusations and acted upon them in good faith when it decided to demote Plaintiff. *Waggoner*, 987 F.2d at 1165; *Agugliaro v. Brooks Bros., Inc.*, 927 F.Supp. 741 (S.D.N.Y. 1996). Lowe's affidavits confirming such good faith belief and action are uncontraverted. Nevertheless, Plaintiff insists it could not have acted in good faith as it did not seek his side of the story before acting and did not follow written company policy. Plaintiff does not claim, however, that the investigation into the claims against him deviated in any way from that conducted into any other matter. That Lowe's management may have been mistaken or employed "medieval" practices in response to these allegations, then, is of no concern. *Elrod*, 939 F.2d at 1470. This Court does not and cannot sit as a "super-personnel department that reexamines an entity's business decisions." *Id.*

Plaintiff insists the Court should infer a discriminatory animus and pretext from his other evidence of discrimination. Specifically, he points to Heath's "port-a-potty" gag gift to Plaintiff at the 1996 Christmas party and his reference to Plaintiff as a "fat, middle aged man". Though Heath participated in the 1997 investigation, his "stray remarks" made in connection with unrelated matters do not prove a discriminatory animus in Plaintiff's

demotion. *Waggoner*, 987 F.2d at 1166; *Atkin v. Lincoln Property Co.*, 991 F.2d 268, 272 (5th Cir. 1993); *Phelps*, 986 F2d at 1025-26. Furthermore, Heath's isolated remarks regarding other, older employees' "old ways of doing things" are too ambiguous to support a finding of age bias. *Phelps*, 986 F.2d at 1025-26. Nor does Plaintiff's subjective belief and conclusory allegations that Lowe's dislikes older workers suffice to prove his case. *Elrod*, 939 at 1471-72. Finally, the fact that Lowe's received one written sexual harassment complaint several days after Plaintiff's demotion does not change the fact that Lowe's was aware of these complaints prior to the discharge. Thus, the Court does not find evidence of pretext in the presence of this one post-demotion complaint. Simply put, there is no evidence that Lowe's did not believe the sexual harassment allegations lodged against Plaintiff or respond to the same in good faith. Plaintiff's discriminatory demotion allegation therefore fails. *Id; Waggoner*, 987 F.2d at 1165.

2.) 1994 Pay Raise

For his second allegation, Plaintiff claims the Defendant acted with a discriminatory animus when it awarded him only a 3% pay raise in 1994 as opposed to the full recommended merit raise amount of 5.5%. Jeff Rowe, the manager who awarded the raise, avers that he awarded the lesser amount despite Plaintiff's satisfactory performance evaluations several months prior because of the employee interaction problems that had arisen during the interim. There is absolutely no evidence that comparable persons were treated more favorably. Nor is there

any evidence that this stated reason is pretext. Consequently, Plaintiff's merit raise discrimination claim fails.

3.) Failure to Promote:

For his final claim, Plaintiff accuses Lowe's of age based discrimination in its decision to transfer and promote Jim Sowards, a person thirteen years Plaintiff's junior, to an Operations Manager position in the spring of 1996. Defendant did not post this position before filling it or solicit applications therefor. Management apparently filled the position out of hand. Though Plaintiff knew of the vacancy, he does not claim he ever expressed any real interest in filling it. Plaintiff insists, however, that he would and should have been selected over Sowards but for his age.

To state a prima facie case of age discrimination in the context of a failure to promote claim, Plaintiff must demonstrate that (1) he belongs to a protected class; (2) he ' "applied and was qualified for a job for which the employer was seeking applicants' "; (3) he was rejected for the position; and (4) his employer continued to seek applicants with Plaintiff's qualifications. *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 709 (2d Cir. 1998). Defendant argues that Plaintiff's failure to promote claim fails because he never applied for the promotion. Plaintiff, on the other hand, insists he had no such duty to apply because Lowe's did not post its vacancies or solicit applications therefor.

As a general rule, the filing of a formal application is a prerequisite to a discrimination claim. *Wanger v. G.A.*

Gray Co., 872 F.2d 142, 147 (6th Cir. 1989). This rule is not without exception, though. The application requirement is loosened, for example, where the employer promotes or hires persons without requesting applications or posting vacancies, has no established application procedure, or reliance on the established application mechanism is futile. *Wanger*, 872 F.2d at 146; *Chambers v. Wynne School Dist.*, 909 F.2d 1214 (8th Cir. 1990); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132-33 (11th Cir. 1984); *EEOC v. IPMC, Inc.*, 156 F.R.D. 163 (E.D. Mich. 1994). Under those circumstances, the employee need only show that he either (1) was unaware of the opening and would have applied therefor had he known of it; or (2) made every reasonable attempt to convey his desire for the position to his employer. *Wanger*, 872 F.2d at 146; *EEOC v. Metal Service Co.*, 892 F.2d 341 (3rd Cir. 1990). This requires something more than an expression of a mere general interest in the position or a general desire to advance. *Wanger*, 872 F.2d at 146, *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (8th Cir. 1998). Rather, Plaintiff must demonstrate that the employer had an obligation to consider him for the position for some reason. *Grant v. Harcourt Brace & Co.*, 12 F.Supp. 2d 748, 754 (S.D. Ohio 1998).

Lowe's did not post or solicit applications for the position filled by Jim Sowards. Plaintiff nevertheless knew of the incident before it was filled. According to Plaintiff, Heath asked him several months prior whether he was interested in applying therefor. Plaintiff responded that he would want to talk to Heath about it. Plaintiff claims he did not follow up until the next day. He then explained what occurred as follows:

> I went to him [Heath] and asked him about why he had asked me if I was interested in interviewing for that position; I was already interested in his opinion, if he thought it would be a good move, his general thoughts on that, and we discussed that. And the office door was open. . . . At one point we had discussed this and he indicated that he thought, yes, that I could do the job, would be a good move. . . . And I asked him his personal opinion of me, and that's when – now, I asked that question. . . . [I]t was about that time . . . I think Mary, I think Jim and I think Steve, all three of them . . . came in at that point I had just finished asking this question, what was his personal opinion of me and his response was, "You remind me of a fat, middle-aged" – I think "old," but at least "man".

It does not appear from this exchange that Plaintiff ever told Heath he was in fact interested in the position. He tried to feel out his chances of actually getting the position which suggested but did not clearly express a genuine desire to fill it. While Plaintiff may have been discouraged by the "fat, middle aged man" remark, Plaintiff cannot show that Heath would not have considered his application had he applied therefor when Heath sought Plaintiff out in the first place.[5] Indeed, Plaintiff claims Heath even advised him this would be a good move for him. The burden of persuasion, as previously explained, always rests with Plaintiff. Because Plaintiff knew of the vacancy, posted or not, failed to express a

---

[5] Plaintiff even testified that he did not believe Heath intended this statement to be insulting.

genuine interest therein, and his employer appeared willing to consider his application should he submit one, Plaintiff cannot be excused from his duty to apply. *See, Brown,* 163 F.3d at 710 (prima facie case fails where plaintiff did not apply for position, even though position was not posted, where there was no evidence that employee lacked knowledge of vacancy or employer was unwilling to consider unsolicited applications).

Even if Plaintiff could make his prima facie case, his failure to promote claim would still fail. Defendant insists it promoted Sowards because he was better qualified. He had Zone 4 experience in the back-end (receiving and delivery) and front-end (customer service and office work) which Lowe's believed important to the Operations Manager position. Plaintiff lacked this experience. Plaintiff may have been qualified in other respects but his employer had every right to exercise its discretion in selecting what it believed to be the most qualified candidate. *Handley,* 827 S.W.2d at 700. Furthermore, Defendant notes that it had already received employee complaints regarding Plaintiff's supervisory style and interaction skills by that time. Confrontational treatment of one's coworkers is a valid, age neutral reason for employee action. *Manzer v. Diamond Shamrock Chemicals Co.,* 29 F.3d 1078, 1082 (6th Cir. 1994).

Plaintiff does not deny any of these facts. Instead, he argues that Lowe's has a history of rapidly promoting younger persons over him whom Plaintiff perceives as less qualified. Such evidence, without more, is insufficient to rebut the Defendant's proffered reasons. *Cox v. Kentucky Dept. of Transportation,* 53 F.3d 146 (6th Cir. 1995). This is particularly so here where Plaintiff, himself,

rose quickly through Lowe's ranks into salaried management positions. Plaintiff's pretext case basically boils down to his own subjective beliefs that age based discrimination was at play. Under the circumstances, Plaintiff's failure to promote claim fails as well.

VI. Conslusion

Plaintiff's case rests primarily on his own subjective belief that Lowe's generally dislikes older workers and that any adverse treatment Plaintiff received was the product of age discrimination. Plaintiff's subjective beliefs, however, do not suffice to prove a discrimination case. *Waggoner v. City of Garland*, 987 F.2d 1160, 1164 (5th Cir. 1993); *Elrod*, 939 F.2d at 1471. Lowe's has offered legitimate, non-discriminatory reasons for every decision it made with respect to Plaintiff's employment. Plaintiff can not prove those reasons to be pretext. In short, there are no genuine issues of material fact in this case so summary judgment is appropriate.

Accordingly, **IT IS HEREBY ORDERED AND ADJUDGED:**

(1) that the Defendant's motion for summary judgment [Record No. 31] is **GRANTED;**

(2) that the pretrial conference currently scheduled for Friday, July 30, 1999, is **SET ASIDE;**

(3) that Defendant's motion to continue the pretrial conference [Record No. 44] is **DENIED** as moot;

(4) that Plaintiff's complaint is **DISMISSED** and Plaintiff shall take nothing thereby;

(5) that this case is **STRICKEN** from the docket; and

(6) there being no just cause for delay, that this is a **FINAL AND APPEALABLE** Order.

This 15 day of July, 1999.

/s/ Henry R. Wilhoit, Jr.
Henry R. Wilhoit, Jr.,
Chief Judge

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON July 15, 1999
LESLIE G. WHITMER, CLERK
BY: /s/ CM Riley D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 97-119

HAROLD MCGUIRE, **PLAINTIFF,**

V. **JUDGMENT**

LOWE'S HOME CENTERS, INC., **DEFENDANT.**

(FILED JUL 15 1999)

In accord with the Court's Memorandum Opinion and Order filed on this date, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED:

1) that the Defendant's motion for summary judgment [Record No. 31] is **GRANTED;**

2) that Plaintiff's complaint is **DISMISSED** with prejudice and Plaintiff shall take nothing thereby;

3) that this matter is **STRICKEN** from the docket; and

4) there being no just cause for delay, that this is a **FINAL and APPEALABLE** judgment.

This 15 day of July, 1999.

/s/ Henry R. Wilhoit, Jr.
Henry R. Wilhoit, Jr.,
Chief Judge

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON July 15, 1999
LESLIE G. WHITMER, CLERK
BY: /s/ C. M. Riley D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 97-119

HAROLD MCGUIRE, PLAINTIFF,

V. ORDER

LOWE'S HOME CENTERS, INC., DEFENDANT.

(FILED JAN 24 2000)

This matter is before the Court on Plaintiff's motion to alter, amend or vacate the Court's judgment in this case. Having carefully considered said motion and the response thereto, the Court finds that it should be overruled. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED:

(1) that Plaintiff's motion to vacate, alter or amend is **OVERRULED**.

This 19 day of January, 2000.

/s/ Henry R. Wilhoit, Jr.
Henry R. Wilhoit, Jr.,
Chief Judge

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON January 24, 2000
LESLIE G. WHITMER, CLERK
BY: /s/ Christina M. Riley D.C.

00-5169

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD MCGUIRE, Plaintiff-Appellant, v. LOWE'S HOME CENTERS, INC., Defendant-Appellee.	)	ORDER (FILED JULY 23 2001)

BEFORE: NORRIS and COLE, Circuit Judges; and STEEH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

* Hon George C. Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk